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Ahmad bin Daud v Koperasi Jimat Cermat dan Pinjaman Mercantile Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S9–22–222 OF 2001
LAU BEE LAN J
27 MAY 2010

Contract — Agency — Principal and agent — Scope of agent's appointment — Whether agent authorised to receive balance of debt due to plaintiff from defendant — Consequences of acts done by agent — Whether same legal consequences as if acts done by principal — Whether notice of revocation of agency properly given — Contracts Act 1950 ss 141(1), 161

The respondent/defendant ('defendant') appointed the appellant/plaintiff ('plaintiff') as its agent to source for and obtain for the defendant a loan of RM80m for which it undertook to pay the plaintiff 4% commission on the amount of financing accepted by the defendant. The plaintiff secured a loan of RM40m for the defendant from a bank which sum was accepted by the defendant. As agreed between the parties, a commission of RM1.6m was payable to the plaintiff. The payment was to be made by the defendant progressively upon release of the RM40m loan to the defendant by the bank. It was not disputed that up till 4 August 2000 the plaintiff had received directly from the defendant RM674,532.41 of the total commission payable. From 15 August 2000 the defendant dealt with an agent ('Rama') appointed by the plaintiff. The plaintiff maintained that the balance of the agreed commission due to him and which the defendant had paid either to Rama or, at Rama's request, to a solicitor's firm, M/s Ariffin and Thava, were breaches of contract by the defendant and that the defendant still owed him the balance of the commission.

Held, dismissing the claim with costs to be taxed unless agreed:

(1) The court found that the various sums paid by the defendant to the plaintiff amounted to RM1.6m, consistent with the calculation of 4% of RM40m. DW2 had also testified on all the particulars of payments by the defendant and confirmed that the defendant had fully settled the payment of RM1.6m to the plaintiff (see para 28).

(2) The contention that all payments made by the defendant to either Rama or M/s Ariffin and Thava amounted to breaches of contract by the defendant did not hold water (see para 29).

(3) The oral and documentary evidence showed the plaintiff had given

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express notice to the defendant appointing Rama as his agent and that Rama was fully authorised to represent the plaintiff on all matters to receive the balance commission owed by the defendant. No limitation or restriction was imposed in the letter of authorisation that Rama was not authorised to receive any payment or that the defendant was not to pay Rama (see paras 10, 11 & 15).

(4) The contention that the defendant had notice of the revocation of Rama's agency had no merit. The oral and documentary evidence showed the plaintiff failed to give the defendant any proper notice of the revocation of Rama as his authorised agent. Thus, the payments made by the defendant to Rama were as good as if payments were made to the plaintiff (see paras 32 & 37).

[Bahasa Malaysia summary

Responden/defendan ('defendan') melantik perayu/plaintif ('plaintif') sebagai ejennya untuk mendapatkan dan memperolehi untuk defendan pinjaman sebanyak RM80 juta yang mana ia berjanji untuk membayar kepada plaintif komisen sebanyak 4% atas jumlah pinjaman yang diterima oleh defendan. Plaintif mendapat pinjaman sebanyak RM40 juta untuk defendan daripada bank yang mana jumlahnya telah diterima oleh defendan. Seperti yang dipersetujui di antara kedua-dua pihak, komisen sebanyak RM1.6 juta yang mesti dibayar kepada plaintif. Bayaran hendaklah dibuat oleh defendan secara progresif selepas pinjaman RM40 juta tersebut dibayar kepada defendan oleh bank. Tidak dipertikaikan bahawa sehingga 4 Ogos 2000 plaintif telah menerima secara terus daripada defendan wang sejumlah RM674,532.41 daripada keseluruhan jumlah komisen yang mesti dibayar. Dari 15 Ogos 2000 defendan berurusan dengan ejen ('Rama') yang dilantik oleh plaintif. Plaintif mengekalkan bahawa baki komisen yang dipersetujui yang kena dibayar kepadanya dan yang mana defendan sama ada bayar kepada Rama atau, atas permintaan Rama, kepada firma guaman, Tetuan Ariffin dan Thava, adalah kemungkiran kontrak oleh defendan dan bahawa defendan masih berhutang dengannya baki komisen tersebut.

Diputuskan, menolak tuntutan dengan kos ditetapkan kecuali dipersetujui:

(1) Mahkamah mendapati bahawa pelbagai jumlah dibayar oleh defendan kepada plaintif berjumlah RM1.6 juta, konsisten dengan pengiraan 4% daripada RM40 juta. DW2 juga memberi keterangan mengenai kesemua butir-butir bayaran oleh defendan dan mengesahkan bahawa defendan telah menyelesaikan bayaran sejumlah RM1.6 juta kepada plaintif (lihat perenggan 28).

(2) Hujahan bahawa kesemua bayaran yang dibuat oleh defendan kepada sama ada Rama atau Tetuan Ariffin dan Thava menyebabkan kemungkiran kontrak oleh defendan tidak berasas (lihat perenggan 29).

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(3) Keterangan lisan dan dokumentar menunjukkan plaintif telah memberikan notis yang nyata kepada defendan dengan melantik Rama sebagai ejennya dan bahawa Rama diberi kuasa penuh untuk mewakili plaintif untuk kesemua perkara menerima baki komisen yang kena dibayar oleh defendan. Tiada had masa atau halangan yang dikenakan di dalam surat pemberian kuasa bahawa Rama tidak ada kuasa untuk menerima apa-apa bayaran atau bahawa defendan tidak patut membayar Rama (lihat perenggan 10, 11 & 15)

(4) Hujahan bahawa defendan mendapat notis mengenai pembatalan agensi Rama tidak bermerit. Keterangan lisan dan dokumentar menunjukkan plaintif gagal memberi kepada defendan apa-apa notis yang sepatutnya mengenai pembatalan Rama sebagai ejen diberi kuasanya. Oleh itu, bayaran yang dibuat oleh defendan kepada Rama adalah seperti jika bayaran-bayaran dibuat kepada plaintif (lihat perenggan 32 & 37).]

Notes

For cases on principle and agent, see 3(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 2452–2453.

Cases referred to

A Debtor (No 1838 of 1911) [1912] 1 KB 53 (refd)
Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 331, FC (refd)
MMC Power Sdn Bhd & Anor v Abdul Fattah Mogawan & Anor [2001] 1 MLJ 169; [2001] 1 CLJ 207, CA (refd)
Moscow Narodny Bank Ltd v Ngan Ching Wen [2005] 3 MLJ 693; [2004] 2 CLJ 241, FC (refd)
United Malayan Banking Corp Bhd v MWE Holdings Bhd & Ors (Dato KK Sharma and Malayan Produce Co Sdn Bhd, third party) [2003] 4 MLJ 88, HC (refd)

Legislation referred to

Contracts Act 1950 s 141(1)

Azhar Arman Ali (Arman - Yunos) for the plaintiff.
Vinod Kumar Sharma (Vinod Sharma Raihan & Co) for the defendant.

Lau Bee Lan J:

[1] The appellant-plaintiff ('the plaintiff') has appealed against my decision made on 5 March 2010 wherein I had dismissed the plaintiff's claim with costs to be taxed unless otherwise agreed.

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[2] The salient facts of the case are as follows. The respondent/defendant ('the defendant') has appointed the plaintiff as their sourcing agent vide its letter dated 24 January 2000 (exh P2) to obtain a loan of RM80m for the defendant. In consideration for obtaining the financing, the defendant undertook to pay the plaintiff commission at 4% of the amount of financing accepted by the defendant. The plaintiff managed to secure a loan of RM40m from Bumiputra-Commerce Bank Bhd ('BCCB') and which was accepted by the defendant on 23 March 2000 as per the letter of offer dated on 22 March 2000 (exh P3). Based on the aforesaid documents, the RM1,600,000 commission (4% of RM40m) was due to the plaintiff from the defendant which payment was to be made by the defendant progressively upon the release of the loan of RM40m to the defendant by BCB.

[3] The court has considered the defendant's written submission dated 19 February 2010, the plaintiff's written submission dated 4 March 2010 and the oral clarifications thereof. The court's findings are as follows.

WHETHER THE PLAINTIFF'S CLAIM IS FOR RM1,600,000 OR RM1,7800,000

[4] Learned counsel for the defendant, Mr Vinod Sharma submitted that the plaintiff's attempt to claim for RM1,780,000 based on the defendant's letter dated 24 April 2000 (exh P4) was an afterthought and was not his pleaded case. I find there is merit in this contention and I agree the defendant is bound by his pleadings.

[5] The plaintiff is his own witness. PW1 in his examination-in-chief (Q&A 13, 19 and 35 WSPW1) stated that the defendant was satisfied with his service and relies on a letter dated 24 April 2000 (exh P4) issued by the defendant claiming for a commission of RM1,780,000. In cross-examination the plaintiff concedes that he did not sign exh P4 and neither did he return a copy of the defendant's letter accepting the terms of the said letter as the original of the said letter is still with him.

[6] In addition a perusal of paras 3–6 of the plaintiff's statement of claim confirms that the plaintiff's claim for commission for RM1,600,000 is based on defendant's letter, exh P2 dated 24 January 2000, and not exh P4, letter dated 24 April 2000. The relevant paragraphs which are underscored for emphasis are reproduced below:

> Perenggan 4
>
> Defendan telah melalui satu *Surat Perlantikan bertarikh 24 Januari 2000*, melantik plaintif sebagai 'sourcing agent' untuk plaintif menguruskan dengan sepenuhnya satu pinjaman bank untuk kegunaan defendan. *Plaintif akan bergantung kepada*

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Surat Perlantikan bertarikh 24 Januari 2000 tersebut di perbicaraan kelak dan akan merujuk kepada terma-terma Surat Perlantikan tersebut.

Perenggan 5

Antara terma-terma Surat Perlantikan bertarikh 24 Januari 2000 tersebut inter alia adalah bahawa sebagai balasan kepada plaintif menguruskan kemudahan pinjaman Bank tersebut, defendan sepatutnya membayar sebanyak Empat Peratus (4%) daripada jumlah pinjaman yang dipersetujui dan diterima oleh defendan dan memandangkan jumlah pinjaman yang dipersetujui dan diterima oleh defendan adalah RM40 juta, jumlah bayaran yang penuh dibuat oleh defendan kepada plaintif adalah RM1,600,000 (4% daripada RM40 juta).

Perenggan 6

Defendan telah membayar kepada plaintiff sebahagian daripada jumlah RM1,600,000 tersebut …

[7] It is not disputed that between 26 May 2000 to 4 August 2000 the defendant had paid the plaintiff the sum totaling RM674,532.41. These payments were paid directly to the plaintiff as per the plaintiff's acknowledgment on the payment vouchers for RM210,000 dated 26 May 2000 (exh P5), RM94,000 dated 7 July 2000 (exh P7) and RM370,432 dated 4 August 2000 (exh P9) of the cheques for the corresponding amounts (exh P6), (exh P8) and (exh P10) received by him.

LETTER OF AUTHORISATION EXECUTED BY THE PLAINTIFF AND THE SCOPE OF RAMA'S APPOINTMENT THEREOF

[8] On 15 August 2000 the plaintiff issued a 'Letter of Authorization to Act' (exh P11) to Ramakrishna a/l BN Raj I/C No 500214–01–6069 ('Rama') and attention to 'En AZMI MAHADI, Project Coordinator' (of the defendant) which reads:

I, En AHMAD DAUD I/C No 560617–08–6269 do hereby fully authorize En. RAMAKRISHNA a/l B.N. RAJ I/C No 500214–01–6069 to act and represent me on all insurance and personal matters between KOPERASI JIMAT CERMAT DAN PINJAMAN MERCANTILE BHD and myself.

[9] What is disputed here is the scope or limit of Rama's appointment as an agent vide the letter of authorisation. Learned counsel for the plaintiff submitted that the letter of authorisation:

(a) did not expressly or impliedly suggest that Rama is authorised to receive payment as it states 'fully authorize … to act and represent me on all insurance matters and personal matters …';

(b) that Rama's authority is only limited to 'represent' the plaintiff in negotiating an early release of the balance commission;

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(c) if Rama's authority is to receive payment or to dictate to whom the balance commission is to be paid, in effect it amounts to an assignment of contractual payment and a modification of the principal contract. To bolster his contention learned counsel cited *Halsbury's Laws of England*, (4th Ed) Vol 1(2) at para 53 'Payment made in the ordinary course of business to the agent of the creditor discharges the debt if the agent is authorized or held out as having authority to receive payment. An agent authorized to sell, however, does not necessarily have implied authority to receive payment for his principal'; and *Moscow Narodny Bank Ltd v Ngan Ching Wen* [2005] 3 MLJ 693; [2004] 2 CLJ 241.

[10] On the other hand learned counsel for the defendant argued:

(a) that the plaintiff has given express notice to the defendant on the appointment of Rama as plaintiff's agent who was fully authorised to act and represent the plaintiff on all matters to acquire or receive the balance commission due and owing from the defendant; and

(b) there are no limitations and/or restrictions whatsoever imposed by the plaintiff on Rama in the letter of authorisation at the material time.

[11] I find there is merit in the defendant's argument as the oral evidence and documentary evidence negates the plaintiff's contention as referred to in para 9 above.

[12] Firstly, it is relevant to note the genesis of letter of authorisation. According to PW1 between 4 August 2000 and 15 August 2000 he met Rama, his old friend, a 'freelance consultant'. At the second meeting, he had disclosed to Rama his problem in recovering his commission from the defendant and he was worried that the situation would worsen if he continued to deal with the defendant's representative, Azmi Mahadi. Therefore he felt it would be better to appoint a middleman to request for the balance of the commission money which remained unpaid. PW1 stated 'Saya bersetuju untuk melantik Rama sebagai orang perantaraan di antara saya dan defendan untuk memperolehi baki wang komisyen yang masih terhutang. Rama bersetuju dengan cadangan saya. Saya memberikan kepada Rama butiran yang perlu dan nombor talipon Azmi Mahadi. Then at the behest of the defendant for the appointment of Rama to be formalised in the form of an 'authorisation letter', the letter of authorisation (exh P11) was drafted by Rama which were both signed by Rama and him. PW1 said that the letter of authorisation did not expressly or impliedly authorised Rama to receive the balance of the commission from the defendant but 'sekadar membenarkan (authorise) Rama mewakili saya untuk berunding dan memohon defendan agar defendan dapat membayar saya kesemua baki wang komisyen yang belum berbayar' and did not expressly or impliedly authorised the defendant to pay Rama, but in the same breath said

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'Kuasa Rama adalah jelas sebagai wakil saya sahaja di dalam apa-apa tuntutan atau rundingan dengan defendan berkenaan baki wang komisyen yang belum berbayar …'. A

[13] The plaintiff insisted there was limitation on Rama's authority but was unable to show its existence in the letter of authorisation as shown in cross-examination (notes of proceedings (NOP) pp 16–17): B

S: Adakah surat kuasa ini mempunyai sebarang penghadan (limitation) ke atas kuasa-kuasa Rama?

J: Ada limitation kepada kuasa Rama. C

S: Sila rujuk kepada Mahkamah dalam surat ini limitation kepada kuasa Rama?

J: Limitation kepada kuasa Rama adalah terhadap insuran dan personal matters sahaja. Personal matters ialah baki komisyen saya yang tertunggak.

S: Adakah surat kuasa ini menghalang Rama untuk menerima baki komisyen yang tertunggak daripada defendan? D

J: Ada menghalang menerima.

S: Sila rujuk surat kuasa ini dan beritahu kepada mahkamah di mana anda telah mengatakan bahawa Rama tidak boleh menerima baki komisyen yang tertunggak daripada defendan? E

J: Limitation, kepada insuran dan personal matters sahaja.

[14] Further PW1 even admitted that neither the plaintiff nor his solicitors gave any express notice to the defendant regarding any limitation as at 1 September 2000 (NOP p 17): F

S: Adakah selepas surat ini (P11) adakah anda atau peguam yang dilantik oleh anda sekiranya ada memberi sebarang notis yang nyata kepada defendan mengenai had-had kuasa Rama untuk berurusan dengan defendan berkenaan dengan baki komisyen yang tertunggak sebelum 1 September 2000? G

J: Tidak ada.

[15] Upon a close perusal of the words used in the letter of authorisation, I find it is generally worded and as far as the defendant is concerned, it was correct to take the position that the plaintiff has fully authorised Rama to act and represent him on all personal matters being the plaintiff's claim for balance of commission due from the defendant which include to acquire or receive the same from the defendant as undoubtedly there is no limitation expressed therein that Rama was not authorised to receive any payment or for the defendant not to pay Rama especially bearing in mind that it was PW1 himself who said that the letter of authorisation was mooted by the defendant. I find support in *MMC Power Sdn Bhd & Anor v Abdul Fattah Mogawan & Anor* H I

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[2001] 1 MLJ 169; [2001] 1 CLJ 207 where on the issue whether the trial judge was correct in ruling that Muhamad Ali (one of the defendants) had acted outside the scope of his employment and held the defendants liable, the Court of Appeal at p 212 said 'The learned judge came to a finding that the first defendant had clearly made representation to the plaintiffs that Muhamad Ali had the authority to act as the Project Manager'. However '[A]ny limitations on [Muhamad Ali's] powers (DW1's admitted in cross-examination that Muhamad Ali's limited power to source but not to make the final decision on recruitment of labour) had never been conveyed to third parties, in particular to the plaintiffs'.

[16] I am in agreement with learned counsel for the defendant that the plaintiff is the author of his own misfortune considering that he is an educated person who upon retirement from the post of a senior officer of Oriental Bank freelanced as a financial consultant and an insurance agent.

[17] In this regard it has to be noted that even in the passage quoted by the plaintiff from *Halsbury's* at para 53, payment to an agent discharges the debt 'if the agent is authorised or held out as having authority to receive payment' and I had made a finding that Rama is authorised to receive payment.

[18] I am of the view that the case of *Moscow Narodny Bank* can be distinguished as one of the questions dealt with by the Federal Court was whether acceptance of part-payment by a judgment creditor (appellant) in the course of bankruptcy proceedings renders the proceedings an abuse of process despite indication by the judgment creditor that such payments would be paid over to the official assignee in the event the debtor (respondent) is adjudicated bankrupt upon the creditor's petition by reason of the absence of full settlement of the judgment debt. It was not disputed that RM504,816.20 was paid to the respondent and accepted by the appellant and which the appellant undertook to pay it to the official assignee. What was disputed was whether it was paid and received as a complete accord and satisfaction of the debt and at p 264 the Federal Court held the answer to be in the negative and said 'Merely accepting payments in the course of bankruptcy proceedings does not render the proceedings an abuse of process, what more when the money is to be paid to the official assignee in the event the debtor is adjudicated bankrupt'. As to learned plaintiff counsel's contention that the Federal Court was invited to scrutinise the agency relationship of a solicitor acting for his client, it is to be noted at pp 256 b–c the Federal Court said 'The question of directing the payment to the appellant's solicitors, as can be seen from the authorities cited (which included Re *A Debtor (No 1838 of 1911)* [1912] 1 KB 53 referred to by the plaintiff counsel at p 253 of the report) is a non issue'.

[19] Based on PW1's evidence one of the reasons which precipitated the

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appointment of Rama was that one Azmi Mahadi of the defendant had visited him before 15 August 2000 with defendant's cheque for the sum of RM270,432.41 made payable to the plaintiff together with a release letter releasing the defendant from paying the balance commission due and requesting PW1 to sign the release letter in exchange for the defendant's cheque. PW1 said he did not agree with the proposal and he became suspicious of Azmi Mahadi when upon leaving PW1's house he said 'I will do something you will never think of with the cheque'.

[20] On a balance of probabilities, I am of the view that such a meeting did not take place between PW1 and Azmi Mahadi for the following reasons. According to PW1 Azmi Mahadi visited him prior to 15 August 2000 and the cheque number for RM270,432.41 was 068669 dated 16 August 2000 (exh P28) and the particulars of which were further supported by PW1's police report dated 2 July 2002 (exh P30). DW2, Khairulzaman bin Abdul Wahid, who having previously served the defendant as a clerk in the accounts division on 2 July 2007 was promoted to the post of 'Eksekutif Kanan Jabatan Operasi' and 'menyelia Bahagian Kawalan Kredit, Bahagian Pinjaman, Bahagian Akaun dan Bahagian Pemasaran' testified that every cheque issued by the defendant requires the signature of three members of the Board and in accordance with procedure a cheque is issued to the named person on the payment voucher. DW2 stated that commencing from 15 August 2000 the defendant dealt with Rama concerning the payment of the balance commission and DW2 confirmed that defendant's payment voucher PV113256 dated 16 August 2000 for RM270,432.41 (exh P27) was the fourth payment of the commission to the plaintiff; and that Azmi Mahadi was just an employee of the defendant and he had no authority to sign any cheques for and behalf of the defendant or remove any cheques of the defendant from the defendant's accounts department. In the light of the aforesaid evidence and the fact that the cheque no 068669 for RM270,432.41 and the corresponding payment voucher (exh P27) were actually prepared after 15 August 2000, I find it renders the account of PW1 on his meeting with Azmi Mahadi before 15 August 2000 highly improbable.

WHETHER THE DEFENDANT IS AUTHORISED TO RELEASE THE CHEQUE OF RM270,432.41 TO THE PLAINTIFF'S AGENT, RAMA

[21] Learned counsel for the plaintiff submitted that the defendant committed the first act of breach of contract when despite Rama's lack of authority to receive payment, the defendant had released a cheque for RM270,432.41 (exh P28 and not exh P27 as referred to in para 20 of plaintiff's written submission) to Rama on 16 August 2000 which was later found to be released to an unknown person 'Omar Husin'.

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[22] This contention of the plaintiff itself is in my view another added reason why the evidence of PW1 regarding his meeting with Azmi Mahadi prior to 15 August 2000 cannot be credible (see paras 10–10.1 above).

[23] Further, having shown the scope of Rama's authorisation based on the letter of authorisation (exh P11), I find the plaintiff's contention is untenable as the defendant has rightfully released the defendant's cheque No 068669 (exh P28) for the sum RM270,432.41 in the name of the plaintiff to Rama the plaintiff's authorised agent who has been shown to act and represent the plaintiff on all matters to acquire and/or obtain the balance omission due and payable by the defendant.

[24] PW1 claimed that though Rama had signed the defendant's payment voucher PV113256 dated 16 August 2000 (exh P27), Rama did not collect the defendant's cheque No 068669 (exh P28). I am in agreement with the defendant that this is mere hearsay and since exhs P27 and P28 are material documents in the narrative of events, the plaintiff's failure to call Rama as a witness has triggered s 114(g) of the Evidence Act 1950.

LETTER OF CONFIRMATION AND ITS EFFECT

[25] Learned counsel for the plaintiff next submitted that in a clandestine manner, the defendant entered into a purported contract, the letter of confirmation dated 1 September 2000 (exh P19) which the plaintiff knew nothing of and to which he was not a party. Learned counsel's argument was two fold — (i) it created an assignment and (ii) it amended the principal contract (exh P2) ie instead of paying the plaintiff, the defendant is allowed to pay a third party in the guise of M/s Ariffin & Thava. Learned counsel then argued that the contract ran foul of principles of assignment and cited s 4(3) of the Civil Law Act submitting for an absolute assignment to be created, it must be made in writing under the hands of the assignor; and in this case, the plaintiff (the purported assignor) assigning his rights to receive payments to M/s Ariffin & Thava was not invited to witness the signing of the letter of confirmation; thus there is no valid assignment of contract payments and the defendant is still obligated to pay the plaintiff under exh P2 and all subsequent payments made either to M/s Ariffin & Thava or to Rama are breaches of contract on the part of the defendant.

[26] I find that the second defendant's argument is flawed. I do not find PW1's statement that he has no knowledge of the letter of confirmation credible in the light of his evidence in cross-examination wherein he admitted that Rama had requested him to sign a power of attorney which was not produced by him and he also said that he was not calling Rama as a witness as he had revoked him. In examination-in-chief PW1 said Rama met him in late

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October 2000 saying that the defendant required a power of attorney as the letter of authorisation was insufficient, and he was shown the document by Rama which amongst others stated 'Rama mempunyai kuasa yang sempurna untuk menerima wang dari defendan'. (NOP p 21). PW1 was subject to rigorous cross-examination on his knowledge of the letter of confirmation (NOP pp 18–22) and his attention was drawn to para 4 of the demand letter from plaintiff's solicitor dated 1 November 2000 (exh P12) and he agreed when queried that as at 1 November 2000 he had agreed to accept the amount of RM560,000 as full settlement of the balance commission and when asked how he arrived at the amount, he answered 'Sebab pada masa itu ejen Rama bernama Sarjit ada datang ke pejabat peguam saya terdahulu menyatakan Koperasi hanya bersetuju membayar saya RM560,000 jika saya melantik semula Rama' but however chose to disagree when it was put to him 'Apa sekiranya saya katakan kepada kamu pada semua masa yang material kamu mempunyai pengetahuan yang nyata bahawa jumlah komisyen yang masih tertunggak dari defendan adalah RM555,035.18' and 'Dan itulah sebabnya kamu membuat tawaran RM560,000 dalam surat peguam bertarikh 1 November 2000 (exh P12) '. But yet again Sarjit was not called as witness and in any event the name 'Sarjit' was information obtained from his previous solicitors and consequently what Sarjit said would be pure hearsay.

[27] There is no assignment involved as the letter of confirmation merely confirms — (A) firstly, the payments that had been received from the defendant by Rama as the authorised agent of the plaintiff (see para [2](1)) as follows:

(i) receipt of the sum of RM674,532.41 comprising —

(a) 26 May 2000 — RM210,100

(b) 7 July 2000 — RM 94,000

(c) 4 August 2000 — RM370,432.41.

(ii) receipt by Rama totalling RM370,432.41 of —

(a) 16 August 2000 — RM270,432.41

(b) 16 August 2000 — RM100,000.

As for the cheque sum of RM100,000, which Rama had confirmed receiving vide defendant's payment voucher PV113257, upon Rama's request, it was replaced by another cheque for the same amount to be paid to M/s Ariffin & Thava (exh D34) which the defendant obliged and replaced with the defendant's payment voucher PV113642 dated 11 September 2000 for the same amount (exh D33) which was duly acknowledged by Rama.
(B) Secondly, it confirms the balance commission to be due and owing by the defendant ie RM555,035.18 and the manner the same is to be paid by the

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defendant (see para [3]) ie to 'Ariffin & Thava' and the said amount was paid as follows:

(i) RM55,035.18 via the defendant's payment voucher PV116152 dated 22 December 2000 (exh P25) and the defendant's Bank Islam cheque No 00033046 duly acknowledged by Rama; the defendant's Bank Islam statement of account dated 31 December 2000 confirms that the said amount has been withdrawn from the defendant's said account (exh D35).

(ii) RM100,000 via the defendant's payment voucher PV116646 dated 30 January 2001 (exh D36) and the defendant's Bank Islam cheque No 00033319 duly acknowledged by Rama; the defendant's Bank Islam statement of account dated 31 January 2001 confirms that the said amount has been withdrawn from the defendant's said account (exh D37).

(iii) RM100,000 via the defendant's payment voucher PV116648 dated 30 January 2001(exh P24) and the defendant's Maybank cheque No 069379 dated 30 January 2001 (exh P23). It is to be noted although there is no acknowledgment of receipt by Rama but DW2 in evidence in chief confirmed the sum of RM100,000 had been paid as eighth payment of commission to the legal firm of M/s Ariffin & Thava (Q&A 28 WSDW2) and learned counsel for the defendant clarified that had the document not been marked by the plaintiff (exh P24), he was prepared to have the said payment voucher marked as a defence exhibit.

(iv) RM300,000 via the defendant's payment voucher PV117080 dated 11 March 2001 (exh P26) and the defendant's Maybank cheque No 069476 dated 11 March 2001 (exh D38) duly acknowledged by Rama.

[28] I find the defendant's submission that the sums of RM674,532.41, RM270,432.41, RM100,000 and RM555,035.18 amounted to RM1,600,000 to be consistent with the calculation of 4% of RM40m to be true. DW2 has testified (Q&A 11–36 WSDWS2) on all the particulars of payments by the defendant to Rama and confirmed that the defendant has fully settled the payment of RM1,600,000 as particularised in exh D39.

(B) Thirdly, the final paragraph of the letter of confirmation states:

> We do hereby attest to the above and agree that there will be no further changes to the above arrangement wherein I, RAMAKRISHNA a/l B.N. RAJ and Koperasi Jimat Cermat Dan Pinjaman Mercantile Bhd shall irrevocably act and continue to act on the basis and in the manner as above contained. (Emphasis added)

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[29] I am of the view that the act of Rama, being the authorised agent of the plaintiff, entering the letter of confirmation with the defendant to be a lawful act as s 141(1) of the Contracts Act 1950 states 'An agent having an authority to do an act has authority to do every lawful thing which is necessary in order to do the act'. Further, s 179 of the Contracts Act provides 'Contracts entered through an agent, and obligations arising from acts done by an agent, may be enforced in the same manner, and will have the same legal consequences as if the contracts had been entered into and the acts done by the principal in person'. To reiterate there is no question of any assignment arising here, but purely of a principal-agency relationship which I agree with learned counsel for the second defendant that the plaintiff would be fully aware of as PW1 was an agent of Malaysia National Insurance ('MNI') at the material time and had executed a letter dated 14 December 1999 (a date prior to his issuance of the letter of authorisation) for and behalf of MNI to the defendant (exh P1) and PW1 has admitted that he works as a 'perunding kewangan dan ejen insuran'. Hence the contention of the plaintiff that all the payments made to either Rama or M/s Ariffin and Thava subsequent to the last payment on 4 August 2000 amount to breaches of contract on defendant's part cannot hold water.

WHETHER THERE IS TERMINATION OF RAMA'S AGENCY

[30] Learned counsel for the plaintiff submitted that the plaintiff had on numerous occasions communicated with the defendant specifically instructing the latter to pay him his commission directly. I find this statement not completely accurate as in fact in his submission only two demand letters were alluded to. They are:

(a) On 1 January 2000, the plaintiff instructed his solicitors, M/s Hisham, Murthy, Saha & Associates to write a demand letter to the defendant (exh P12) which states —

  (i) As such, kindly let us have your Bankers' cheque for the said sum of RM560,000 made payable directly to our client, En. Ahmad Bin Daud (NRIC:560617-08-6269) within FOURTEEN (14) DAYS hereof (para 4);

  (ii) Further, kindly be advised that henceforth all correspondences relating to this matter is to be directed to us and not to Mr Ramakrishnan (last paragraph).

(b) Further, on 18 January 2001(exh P18) the plaintiff's solicitors wrote another demand letter to the defendant — 'TAKE NOTICE that if you fail to settle the said sum of RM1,044,000 only with us as solicitors for En. Ahmad Bin Daud within SEVEN (7) DAYS hereof, we have strict instructions to commence legal proceedings against you without further reference' (para 3).

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[31] Learned counsel then submitted that these letters indicate that:

(a) Rama has no longer has any authority to deal with the negotiations pertaining to the commission;

(b) it satisfied the requirement of s 160 of the Contracts Act that 'Revocation and renunciation may be expressed or may be implied in the conduct of the principal or agent, respectively';

(c) the conduct of the defendant was unconscionable in not replying to the demands from the plaintiff and even if the defendant was genuinely confused, they should have sought clarification from the plaintiff or Rama; and

(d) there is no ratification of the letter of confirmation by the plaintiff or of any conduct of Rama in receiving and/or collecting the cheques from the defendant citing *Halsbury's Laws of England*, (4th Ed) Vol 1(2) at para 145 'The third party is not discharged from his liability to the principal by any payment to or settlement with the agent, unless such payment or settlement is ratified by the principal or is made in the ordinary course of business, or in accordance with the agent's authority, express, implied or apparent' (Emphasis added).

[32] I find there is no merit whatsoever in the contentions submitted by the plaintiff that the defendant has notice of the plaintiff's revocation of Rama's agency. After being subjected to a string of questions during cross-examination as to where in the letter dated 1 November 2000 (exh P12) particularly, the last paragraph as contended by him show that there is revocation of the letter of authorization of Rama as agent of the plaintiff (NOP pp 22–24), the answers from PW1 point to the fact that there was none and it climaxed in an admission by PW1 as at pp 23–24 NOP:

S: Rujuk surat 1 November 2000 [Exh.P12] Rujuk kepada ms 25 [IDP15] (PW1 membaca 'Revocation of Appointment as Agent/ Revocation of Letter of Authority dated 15 Ogos 2000). Ini bermakna bahawa apa yang kamu jawab sebelum ini tak betul?

J: Betul.

S: Ini bermakna surat yang bertarikh 1 November 2000 di ms 21 [Exh P12] sebenarnya secara nyata tidak membatalkan surat kuasa anda bertarikh 15 Ogos 2000 [Letter of Authorization, Exh P11]?

J: Betul.

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[33] Like exh P12 which is titled 'Commission Consultancy Fees Payable to En Ahmad Bin Daud' and is not a revocation letter of the letter of authorisation (exh P11), which forms the basis of Rama's appointment as agent of the plaintiff, the other letter dated 18 January 2001 (exh P18) also bears the same heading. Based on PW1's evidence given in examination-in-chief (Q & A 44 WSPW1) 'Surat ini adalah suatu notis tuntutan betarikh 18 Januari 2001. Melalui peguam saya, saya menuntut jumlah keseluruhan baki komisyen yang tertunggak sebanyak RM1,044,000' and a perusal of the contents of exh P18, it is a far cry from being a letter of revocation terminating the letter of authorisation (exh P11).

[34] I observed that the learned counsel for the plaintiff in his submission has made no reference whatsoever to two documents, IDP15 and IDP16 and appears to have abandoned them and I am also mindful of the fact that these were never marked as exhibits (NOP pp 31–32). However I am addressing it because of the manner these two documents feature in the proceedings. As submitted by learned counsel for the defendant, there was much ado in the course of the trial (NOP pp 23–24 in cross-examination of PW1 and pp 29–32 in re-examination of PW1), wherein the learned counsel for the plaintiff attempted to mark a letter dated 17 November 2000 issued by the then plaintiff's solicitors, M/s Hisham, Murthy, Saha & Associates to Rama and copied to the defendant (IDP15) which the defendant denied receiving and which request for marking as exhibit was objected to by the defendant's counsel. The heading of IDP15 was 'Revocation of the Appointment as Agent/Revocation of Letter of Authority dated 15 August 2000'. A pertinent question to be asked is why did the plaintiff's solicitors issue another revocation letter dated 17 November 2000 if they had properly issued the revocation letter dated 1 November 2000? The whole exercise by the plaintiff was to establish that the plaintiff had already given the defendant proper notice of the revocation of Rama as the authorised agent of the plaintiff vide a fax slip from the then plaintiff's solicitors (IDP16) as claimed by the plaintiff. However in cross-examination, it transpired that the said fax slip bore the notation 'communication error' which meant that that the letter dated 17 November 2000 never made it through to the defendant.

[35] Section 161 of the Contracts Act states:

> The termination of the authority of an agent does not, so far as regards the agent, take effect before it becomes known to him, or, so far as regards third persons, before it becomes known to them. (Emphasis added.)

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[36] Illustration b to s 161 of the Contracts Act reads:

> A, at Port Dickson, by letter directs B to sell for him some cotton lying in a warehouse in Kelang, and afterwards, by letter, revokes his authority to sell, and directs B to send the cotton to Port Dickson. B, after receiving the second letter, enters into a contract with C, who knows of the first letter, but not of the second, for the sale to him of the cotton. C pays B the money, with which B absconds. C's payment is good as against A. (Emphasis added.)

[37] I find based on the oral and documentary evidence, the plaintiff has failed to give the defendant any proper notice as to the revocation of Rama as his authorised agent as there is no compliance of s 160 of the Contracts Act and Illustration b is most appropriate in driving home the point that the payments by the defendant to Rama are as good as payments to the plaintiff.

OTHER MATTERS

[38] In examination-in-chief, PW1 said that he had lodged a police report dated 17 May 2001(exh P21) and also stated 'Baru2 ini saya dapat tahu bahawa Ramakrishna tersebut telah pecah amanah dan membuat penipuan keatas saya dimana beliau telah … wang komisyen yang sepatutnya dibayar kpd saya oleh Koperasi sebanyak lebih kurang RM500,000. Oleh itu saya membuat aduan ini kerana saya dianiaya oleh Ramakrishna a/l BN Raj tersebut' (emphasis added). In cross-examination, PW1 confirmed that it was 'Ramakrishna' that committed the criminal breach of trust and deception. The said police report was lodged after the Writ of Summons was filed on 28 March 2001. I am in agreement with the learned counsel for the defendant that having realised that it was Rama who cheated and committed criminal breach of trust against him, he should have sued Rama, his authorised agent for all the monies received by him and not the defendant who has settled fully the balance commission payable to the plaintiff.

[39] Finally based on the evidence adduced, the plaintiff is now estopped from claiming monies which have already been fully paid by the defendant to Rama, his authorised agent (see *United Malayan Banking Corp Bhd v MWE Holdings Bhd & Ors* (*Dato KK Sharma and Malayan Produce Co Sdn Bhd, third party)* [2003] 4 MLJ 88 (HC) at p 95A–D), which I agree with.

[40] It is observed that although estoppel was not pleaded in the statement of defence, I find that 'the material facts giving rise to estoppel were sufficiently pleaded without actually using the term 'estopped' and 'considerable evidence on the point was led at the trial by the defendant without objection from the plaintiff' (per Gopal Sri Ram JCA (as he then was) at p 341I to p 342A–G in

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Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 331(FC).

[41] For all the foregoing reasons on a balance of probabilities, I found that the plaintiff has not proven his case and to reiterate I had dismissed his claim with costs to be taxed unless otherwise agreed.

Claim dismissed with costs to be taxed unless agreed.

Reported by Ashok Kumar